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No. 96-1607

In the Supreme Court of the United States

OCTOBER TERM, 1996

DUWAMISH INDIAN TRIBE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court abused its discretion in denying a motion, under Federal Rule of Civil Procedure 60(b)(6), for relief from a fourteen-year-old judgment, on the ground that the now-deceased judge may have been suffering from an early stage of a mentally debilitating illness at the time he entered the judgment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 98 F.3d 1159. The opinion of the district court (Pet. App. 22a-30a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 23, 1996. A petition for rehearing was denied on January 6, 1997. Pet. App. 20a-21a. The petition for a writ of certiorari was filed on April 7, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners, the Duwamish, Snohomish, and Steilacoom Indian tribes,[1] seek to reopen a chapter of litigation concerning Indian fishing rights in the State of Washington that began in 1970 and was resolved in 1979.

1. a. In 1970, the United States, on its own behalf and as trustee for seven Indian tribes, brought an action in the United States District Court for the Western District of Washington against the State of Washington and certain state agencies. The United States sought declaratory and injunctive relief concerning fishing rights of the plaintiff tribes, under a series of treaties in the 1850s, in which Indian tribes had relinquished to the United States their aboriginal rights to land in exchange for the right to take fish in certain areas of the then-Washington Territory. Seven additional tribes intervened as plaintiffs shortly after suit was filed. In 1974, United States District Judge George H. Boldt ruled that all 14 plaintiff tribes had treaty fishing rights that entitled them to take up to 50 percent of the harvestable fish on runs passing through their traditional off-reservation fishing grounds. *United States* v. *Washington*, 384 F. Supp. 312, 327-423 (W.D. Wash. 1974), aff'd, 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976); Pet. App. 5a & n.1, 23a-24a. Judge Boldt's ruling met substantial resistance from the State and

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[1] Although we use the term "tribe" to refer to each of the three petitioners, we use that term in a generic manner, not to suggest that petitioners constitute tribes in the legal or political sense. See *United States* v. *Washington*, 476 F. Supp. 1101, 1104 n.1 (W.D. Wash. 1979), aff'd, 641 F.2d 1368 (9th Cir. 1981), cert. denied, 454 U.S. 1143 (1982).

spawned other lawsuits that ultimately reached this Court, where Judge Boldt's interpretation of the treaties was affirmed. *Id.* at 5a-6a n.3; see *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979).

b. Meanwhile, shortly after Judge Boldt's 1974 decision, five additional Indian groups, including the three petitioners herein, moved to intervene as plaintiffs, contending that they also are tribes entitled to rights under the treaties. On September 13, 1974, Judge Boldt referred the matter to a magistrate judge to analyze the status, under the treaties, of the five intervenors. Pet. App. 6a. After receipt of evidence and a hearing, the magistrate judge issued a report on March 5, 1975. The magistrate judge concluded that none of the five intervenors qualified as a treaty tribe and recommended a conclusion of law that none of them had fishing rights under the treaties at issue. *Id.* at 7a.

The five intervenors appealed to Judge Boldt from the magistrate judge's report. Judge Boldt held a de novo evidentiary hearing during three days in 1975, then directed the parties to submit additional evidence in 1976, and heard oral argument in 1977. Pet. App. 7a.

While the matter was under submission, Judge Boldt underwent surgery for an aortic aneurysm in February 1978. He informed counsel in July 1978 that he was not yet fully recovered, but expected to rule on the matter within the next several months. Pet. App. 7a. On February 7, 1979, however, Judge Boldt notified counsel that, because of his failing health, he had requested that the chief judge remove him from the case. Four of the five intervenors, including two petitioners herein, filed a motion requesting that Judge

Boldt decide the question whether they qualify as treaty tribes with respect to fishing rights. *Ibid.* The chief judge granted the motion on March 14, 1979, noting that it was in the best interests of judicial administration, economy, and the interests of all parties, and that Judge Boldt had indicated that he would be willing to consider and rule on the matter. *Ibid.*

On March 23, 1979, Judge Boldt issued his decision, ruling that the five intervenors do not have fishing rights under the treaties at issue. *United States* v. *Washington*, 476 F. Supp. 1101, 1102-1111 (W.D. Wash. 1979), aff'd, 641 F.2d 1368 (9th Cir. 1981), cert. denied, 454 U.S. 1143 (1982). In doing so, he adopted, with minor changes, the proposed findings of fact and conclusions of law that had been submitted by the United States. Pet. App. 7a-8a. Judge Boldt subsequently denied the five intervenors' motion for reconsideration. *Id.* at 8a.

c. The court of appeals affirmed Judge Boldt's ruling rejecting the treaty fishing-right claims of the five intervenors. *United States* v. *Washington*, 641 F.2d 1368 (9th Cir. 1981). As a threshold matter, the court noted that Judge Boldt had adopted the United States' proposed findings and conclusions without substantial change. *Id.* at 1371. It stated that such verbatim adoption is disfavored and "calls for close scrutiny by an appellate court," although "findings still must be upheld unless clearly erroneous." *Ibid.*

The court of appeals rejected the legal standard that Judge Boldt had indicated was decisive in determining whether the intervenors had treaty-tribe status, and it found that, although Judge Boldt mentioned other considerations that were relevant, they did "not adequately define the controlling principles."

641 F.2d at 1372. Therefore, the court of appeals proceeded to determine the correct legal principles that should govern the case. *Id.* at 1372-1373.

After having announced the controlling law, the court of appeals undertook to examine the record in the case to determine whether the result reached by the district court was correct despite the erroneous legal analysis thereunder. 641 F.2d at 1373-1374. "After close scrutiny," the court of appeals concluded that the record evidence supported the district court's finding of fact that, since treaty times, the five intervenors had not functioned as "continuous separate, distinct and cohesive Indian cultural or political communit[ies]." *Id.* at 1373. The court therefore concluded that "the district court correctly resolved th[e] question [of maintenance of tribal structure] despite its failure to apply the proper standard," and affirmed the district court judgment. *Id.* at 1374.[2]

This Court denied review. 454 U.S. 1143 (1982).

2. a. Judge Boldt passed away on March 18, 1984. His death certificate lists pneumonia as the immediate cause of death, and Alzheimer's disease as a secondary cause. According to the death certificate, the onset of Alzheimer's was six years earlier. Pet. App. 8a; C.A. Exc. Rec. 30.[3]

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[2] In a dissenting opinion, Judge Canby disagreed with the panel majority's analysis of the legal significance of the district court's factual findings, and he analyzed those findings in detail. 641 F.2d at 1374-1376. Judge Canby stated that he would have remanded the matter to the district court for further findings. *Id.* at 1376.

[3] The death certificate indicates that no autopsy was performed. Accordingly, it is impossible to say with certainty that the judge actually had Alzheimer's disease at the time of

More than nine years after the judge's death, more than fourteen years after entry of judgment, and almost one and one half years after publication of a newspaper article about the judge's health (see note 3, *supra*), petitioners filed a motion, under Federal Rule of Civil Procedure 60(b)(6), for relief from the 1979 judgment. Pet. App. 9a, 24a-25a. The United States, the State of Washington, and various Indian tribes that had been involved in the extensive litigation over the treaty fishing rights, opposed the motion. *Id.* at 25a. At oral argument a year later, petitioners asserted that the motion was for the limited purpose of conducting discovery into the judge's mental health at the time of the entry of judgment, but the record did not reflect that petitioners had filed any motion for discovery during the elapsed year. *Id.* at 9a.

b. The district court denied relief. Pet. App. 22a-30a. Relying on *Liljeberg* v. *Health Services Acquisition Corp.*, 486 U.S. 847, 863-864 (1988), the court recognized that relief from judgment under Rule 60(b)(6) should be granted only in "extraordinary circumstances" that require relief to correct injus-

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his death in 1984, let alone in 1979. See C.A. Supp. Exc. Rec. 3 (Guy McKhann, M.D., et al., *Clinical diagnosis of Alzheimer's disease: Report of the NINCDS-ADRDA Work Group under the auspices of Department of Health and Human Services Task Force on Alzheimer's Disease*, 34 Neurology 939 (1984)).

Petitioners contend that they became aware of the contents of the judge's death certificate only in June 1992 when a newspaper reported that, at the time of the 1979 ruling, Judge Boldt suffered from Alzheimer's disease. Pet. App. 8a. The article also relied on statements by the judge's son regarding the time of onset, but the son stated that he believed his father to have been mentally competent when he entered the ruling against petitioners in 1979. *Id.* at 8a-9a.

tice. Pet. App. 25a-26a. The court examined the factors of timeliness, public interest in finality of judgments, and need for correction of injustice. It rejected petitioners' contention that the court had to make the "exceedingly difficult determination" of how to resolve a direct conflict between a need for finality and a need to correct an injustice. Rather, "[a]fter carefully examining all of the events surrounding this case," the court concluded that "no manifest injustice was done." *Id.* at 28a.

The court reviewed the record and concluded that petitioners had not been prevented from submitting any evidence or arguments for judicial consideration when the district court ruled on their treaty status. And, the court observed, petitioners' reliance on the suggestion that Judge Boldt may have suffered from a mental impairment at the time he signed the final order in 1979 ignored the fact that he was not the only judicial officer to have reviewed petitioners' contentions and to have reached the same conclusion. The court pointed out that, after five days of hearings and review of testimony and evidence, the magistrate judge had reached the same conclusion that Judge Boldt subsequently did. Pet. App. 28a. "More significantly," the court emphasized, the court of appeals panel that reviewed Judge Boldt's judgment on direct appeal reached the same result based on an analysis that constituted more than a review for clear error. *Id.* at 28a-29a. The court concluded that, "[g]iven the language in the Ninth Circuit opinion indicating that the court carefully examined the evidence presented by the moving tribes before deciding to affirm Judge Boldt's findings as correct," petitioners "failed to make the kind of showing of manifest error necessary

to even consider reopening a judgment so many years after its entry." *Id.* at 29a.

c. The court of appeals affirmed. Pet. App. 1a-19a. It held that the district court had not abused its discretion in denying petitioners' Rule 60(b)(6) motion. The court concluded that "[t]his is not one of those rare cases where 'extraordinary circumstances' warrant vacating an 'erroneous judgment.'" Pet. App. 11a (quoting in part *Liljeberg*, 486 U.S. at 864, and *United States* v. *Alpine Land & Reservoir Co.*, 984 F.2d 1047, 1049 (9th Cir.), cert. denied, 510 U.S. 813 (1993)). The court noted that the record indicated that Judge Boldt had remained aware of his obligation to decide petitioners' treaty status, such that he had asked to be removed from the case when he felt that his physically weakened condition would not permit him to decide the matter within several months as anticipated. Pet. App. 11a. Four of the five intervenors, including two petitioners, nonetheless had requested that Judge Boldt decide the issue, and the judgment from which petitioners now seek relief resulted from the court's granting that request. *Id.* at 7a, 11a. The court also emphasized that a magistrate judge and the court of appeals itself had closely examined the case and reached the same conclusion as Judge Boldt. *Id.* at 12a.[4]

In a concurring opinion, Judge Kozinski reached the same result via a different analysis. He concluded that Rule 60(b)(6) would not have authorized the

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[4] In closing, the court indicated that "[a] decision whether Rule 60(b)(6) gives the district court the power to correct a manifest injustice arising from a judge's disability should await the extraordinary circumstances in which it might be presented." Pet. App. 12a.

district court to grant petitioners relief from judgment, even if Judge Boldt had been mentally disabled at the time of entry of judgment, because Rule 60(b)(6) authorizes relief only where relief would have been available at the time of the entry of judgment. In Judge Kozinski's view, petitioners would not have been able to have Judge Boldt removed from the case at the time of the entry of judgment had they been aware of a mental disability while he was presiding over their case, because there is no statutory basis for requiring a judge to recuse himself on grounds of mental disability. Pet. App. 13a-16a (discussing statutes and case law). The only recourse would have been to complain to the circuit judicial council through a separate, quasi-adjudicative proceeding. *Id.* at 14a (citing 28 U.S.C. 372(c)).

Judge Kozinski concluded, however, that the panel majority's erroneous assumption regarding the scope of Rule 60(b)(6) was offset because it nonetheless denied relief based on its determination that the district court did not abuse its discretion by denying petitioners discovery. In Judge Kozinski's view, although that ruling led to the correct result, it too was erroneous because, if mental disability were a basis for setting aside a judgment under Rule 60(b)(6), petitioners had made a showing sufficient to justify discovery. *Id.* at 16a-17a.

ARGUMENT

1. Petitioners assert (Pet. 2, 18) that "[t]he fundamental question in this case is whether a litigant is entitled to relief from a judgment if the district court judge lacked mental competence at the time he issued his decision." They contend (*id.* at 11-14) that the court of appeals' opinion does not comport with the

Court's due process jurisprudence regarding the right to a fair trial and to a competent and impartial trier of fact. They urge (*id.* at 14) the Court to "confirm for the first time" a due process right to a competent judge. They also contend (*id.* at 14-16) that the panel majority's refusal to enforce that right is inconsistent with this Court's rulings regarding the availability of relief under Federal Rule of Civil Procedure 60(b)(6) to effectuate due process rights.

The court of appeals' panel majority did not address the question presented by petitioners. Rather, it assumed, *arguendo*, that the due process right asserted by petitioners exists. Moreover, it assumed that relief for violation of that right would be available under Rule 60(b)(6) in certain circumstances. The court of appeals concluded, however, that, in the particular circumstances of this case, the district court had not abused its discretion in determining that petitioners had not made a sufficient showing to warrant such relief. See Pet. App. 11a-12a.

Consequently, contrary to petitioners' suggestion (Pet. 11-14), the decision below does not implicate important due process issues warranting review by this Court. Petitioners' true complaint regarding treatment of the due process claim below is with the rationale of the concurring opinion. That opinion (Pet. App. 12a-19a) did address the question presented by petitioners and reached a conclusion contrary to that urged by petitioners. That reasoning was based on the view that Rule 60(b)(6) would not authorize relief from judgment based on evidence regarding mental impairment of a judge because such impairment cannot be used to seek a judge's recusal at the time of judgment or on direct appeal. *Id.* at 13a-16a. Rather, in the view of the concurring opinion,

recourse in such instances must be made to the circuit judicial council. Pet. App. 14a (citing 28 U.S.C. 372(c)).

Petitioners do not demonstrate, however, that if review were granted, the question of whether post-judgment relief is ever available based on alleged mental impairment of the judge, would even be reached by this Court. Rather, as the court of appeals panel majority reasoned, failure to find that petitioners suffered an injustice resolves the case under Rule 60(b)(6). Because it assumed that Rule 60(b)(6) relief would be available based on a judge's mental disability under certain circumstances, the panel majority's ruling does not present any conflict with the due process right that petitioners derive from this Court's jurisprudence. Indeed, the court of appeals (as well as the district court) relied upon, and reached a result consistent with, the authority cited by petitioners (Pet. 14-15) regarding Rule 60(b)(6). See Pet. App. 11a (quoting in part *Liljeberg* v. *Health Services Acquisition Corp.*, 486 U.S. 847, 863-864 (1988)); *id.* at 25a-26a (district court's citation to *Liljeberg*).

The court of appeals weighed the considerations identified by the Court and cited by petitioners as relevant to a Rule 60(b)(6) determination. See Pet. 15; Pet. App. 10a-12a; see also *id.* at 26a-30a (district court's weighing of factors). The court of appeals (as well as the district court) simply viewed the circumstances of the case differently than do petitioners and, under the legal analysis urged by petitioners, found that the balance between likely injustices warranted denial of relief. That determination does not warrant further review. Moreover, as the court of appeals stated, consideration of the question of whether relief

from judgment would be available upon a showing of incompetence and injustice should await a case, unlike this one, that involves the extraordinary circumstances in which that question might be presented. See Pet. App. 12a.[5]

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[5] Even if it were likely that the Court would reach the question of whether relief is ever available under Rule 60(b)(6), petitioners do not demonstrate that it warrants review. Petitioners rely (Pet. 11-12 & n.4) on cases that emphasize the importance of judicial impartiality. Also, in *Bracy* v. *Gramley*, No. 96-6133, 1997 WL 303400 (June 9, 1997), the Court recently held that a habeas petitioner had made a sufficient factual showing to establish good cause for discovery on a claim of judicial bias in a death penalty case. The Court emphasized that there was extensive evidence in that case to rebut the presumption that the judge properly discharged his official duties, because the judge in that case had been convicted on corruption charges and the allegation was that he was actually biased against petitioner in his particular case as well. The issues presented in cases such as that—judicial bias, partiality and financial interest—all go to factors that are relevant to the disqualification of judges under 28 U.S.C. 455, whereas mental impairment is not. Also, as petitioners acknowledge, in *Slayton* v. *Smith*, 404 U.S. 53 (1971), the one case involving an allegation that a judge suffered from senility at the time of sentencing, the Court disposed of the case on grounds of failure to exhaust state remedies in habeas proceedings, without reaching the merits of the issue.

Petitioners also rely (Pet. 12) on cases concerning the disqualification of jurors because of lack of mental capability. The considerations relating to disqualification of jurors and judges are different, however, as can be seen from a comparison of 28 U.S.C. 1865(b)(4)("mental or physical infirmity" may be grounds for juror disqualification) with 28 U.S.C. 144 and 455 (no mention of mental or physical infirmity among grounds specified for disqualification of judges). And in the juror cases involving post-verdict evidence of possible juror incompetency, courts "have refused to set aside a verdict, or even to make

2. Petitioners contend (Pet. 16-18) that the Court should grant review because the court of appeals disregarded the important fact-finding role of a district court judge.

The court of appeals' reliance on the fact that Judge Boldt's ruling was consistent with the conclusion of the magistrate judge, and was upheld after "close scrutiny" by the court of appeals, does not denigrate the importance of the district court's fact-finding role. It simply reflects that courts, in response to a Rule 60(b)(6) motion, must consider "the risk of injustice to the parties in the particular case," along with "the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process." *Liljeberg* v. *Health Services Acquisition Corp.*, 486 U.S. at 864. The fact that other judges had carefully scrutinized petitioners' claims and found them meritless reduces the risk of possible injustice, and is an appropriate factor to weigh in determining whether to grant relief under Rule 60(b)(6).

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further inquiry, unless there be proof of an adjudication of insanity or mental incompetence closely in advance . . . of jury service," or proof of "a closely contemporaneous and independent post-trial adjudication of incompetency." *Tanner* v. *United States*, 483 U.S. 107, 119 (1987) (quoting *United States* v. *Dioguardi*, 492 F.2d 70, 80 (2d Cir.), cert. denied, 419 U.S. 873 (1974)); see *Dioguardi*, 492 F.2d at 80 nn. 13 & 14 (collecting cases). There was no such adjudication here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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